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No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and
ROSE JONES,
Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on an organizational plaintiff either based on the organization's general interest in equal housing opportunity and its efforts to further that interest, or as a representative of its members, in the absence of allegations sufficient to meet the requirements of *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333 (1977).

2. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on a "tester" or surrogate for persons directly injured by alleged discrimination, absent any allegation of injury to the tester.

3. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on a person who alleges that a defendant has deprived him of the benefits of interracial association but who fails to allege any facts supporting a causal nexus between the defendant's acts and that deprivation.

4. Whether the allegation of a continuing pattern of discrimination affects the determination of when the 180 day limitation period under the Fair Housing Act commences to run.

PARTIES IN THE COURT OF APPEALS

Paul Allen Coles, a plaintiff in the district court, was listed in the caption of the court of appeals as plaintiff, but not as appellant. There were no issues with respect to him in the court of appeals and he has no interest in the outcome of this proceeding. All other parties are named in the caption of the case in this Court.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit, which is reported at 633 F.2d 384 (4th Cir. 1980), appears in the Joint Appendix at App. 63-81. The opinion of the United States District Court for the Eastern District of Virginia is unreported. It appears in the Joint Appendix at App. 33-35.

JURISDICTION

The Court of Appeals for the Fourth Circuit entered judgment on September 11, 1980. The petition for certiorari was granted on April 20, 1981.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

THE STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. § 1982

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 3604:

§ 3604. Discrimination in the sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

42 U.S.C. § 3612:

§ 3612. Enforcement by private persons

(a) Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the

Secretary of a State or local agancy are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c)Injunctive relief and damages; limitation; court costs; attorney fees

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

42 U.S.C. § 3613(a)

§ 3613. Enforcement by the Attorney General; issues of general public importance; civil action, Federal jurisdiction; complaint; preventive relief

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

STATEMENT OF THE CASE

This case arose from the alleged practices of Havens Realty Corporation (hereafter "Havens") and one of its employees Rose Jones ("Jones"), in Henrico County, Virginia, a suburb of Richmond, Virginia. Havens is a Virginia corporation with its principal place of business at two apartment complexes, Camelot Townhouse Apartments and Colonial Court Apartments, which are located directly across the street from each other. They are owned and managed by Havens.

On January 9, 1979, Paul Allen Coles (Coles), Sylvia Coleman (Coleman), R. Kent Willis (Willis), and Housing Opportunities Made Equal (HOME) filed an action in the United States District Court for the Eastern District of Virginia, Richmond Division, alleging that the defendants had engaged in the practice of racial steering of prospective apartment renters, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1982, and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (the Fair Housing Act). The district court's jurisdiction was based on 42 U.S.C. § 3612(a) and 28 U.S.C. §§ 1331, 1337, 1343(4) and 2201. The Complaint sought declaratory and injunctive relief, compensatory and punitive damages, and

costs and attorney's fees. The individual plaintiffs purported to represent a class composed of all persons who have rented or sought to rent property in Henrico County, Virginia, and who have been or continue to be, adversely affected by the acts, policies, and practices of Havens.

The Complaint, which is included in the Joint Appendix (App. 11-20), characterizes Coles, a black man, as a "renter plaintiff." The expression "renter plaintiff" means that Coles sought housing information from Havens and was ready, willing, and able to sign an apartment lease with Havens. This concept of "renter plaintiff" contrasts with the characterization of the other two individual plaintiffs. Coleman, a black woman, and Willis, a white man, were not actually seeking housing information for their own purposes, nor were they ready, willing and able to execute a lease. Instead, as the Complaint alleges, they "consulted [Havens and Jones] with regard to available rentals in the course of their employment with Housing Opportunities Made Equal to determine whether or not [Havens and Jones] have practiced racial steering in the rental housing market" (App. 13).

The organizational plaintiff, HOME, is a Virginia non-profit corporation, with its principal place of business in Richmond, Virginia. HOME's purpose, the Complaint states, is "to make equal opportunity in housing a reality in the Richmond Metropolitan Area" (App. 13). The Complaint alleges that HOME has a multi-racial membership of approximately 600 people, but it fails to allege where any of its members reside or any additional facts concerning HOME's members. HOME's goals are alleged to include the elimination of unlawful racially discriminatory housing practices that cause injury to its members, to all persons who seek apartment units in the Richmond Metropolitan Area and to all persons who reside in the Richmond Metropolitan Area (App. 13). It is alleged that HOME seeks to assure all such persons the right to the important social, professional, business, economic and political benefits of interracial associations that arise from living in integrated communities (App. 13). Finally, the Complaint states that HOME's activities include: (1) seeking to assist and

aid individuals of all races in obtaining housing in the Richmond Metropolitan Area through the operation of a housing counseling service, (2) investigation of allegations of discrimination and the referral of complaints to appropriate state and federal agencies, and (3) independent investigations of real estate brokers located in the Richmond Metropolitan Area (App. 13-14).

The Complaint makes both general and specific allegations against the defendants. The Complaint alleges generally that the defendants treat differently white and non-white prospective lessees on the basis of race by showing white customers rental units in buildings occupied primarily by white tenants, by failing to show such units to black customers, and by showing black customers units in buildings occupied primarily by black tenants. More specifically, the Complaint identifies five distinct instances of alleged steering by the defendants. The only instance involving the renter plaintiff, Coles, occurred on July 13, 1978, or 180 days prior to the filing of the Complaint. All other instances involved either non-party testers or the tester plaintiffs, Coleman and Willis, and all of these occurred more than 180 days prior to the filing of the Complaint.

On January 31, 1979, the defendants filed a motion to dismiss stating, among other things, that (1) all claims asserted under the Fair Housing Act were time barred and should be dismissed, except the claim arising on July 13, 1978, and that (2) HOME, Coleman, and Willis lacked standing to assert claims under the Fair Housing Act of 1968 and the Civil Rights Act of 1866 (App. 21). On February 16, 1979, the district court sustained the defendants' motion to dismiss on both grounds (App. 32). A timely notice of appeal was filed by HOME, Coleman and Willis (App. 61).

On September 18, 1980, the Fourth Circuit reversed the decision of the district court (App. 63-81). The court of appeals held that Coleman's and Willis' mere status as testers was sufficient to confer standing under the Fair Housing Act. The court of appeals further held, in the alternative, that Coleman and Willis had standing in their individual capacity (as opposed to their capacity as testers) because they had

alleged specific injury by averring that the defendants' conduct had deprived them of the right to "important social, professional, business and economic, political and aesthetic benefits of interracial association that arise from living in integrated communities free from discriminatory housing practices. . . ." (App. 17). The Fourth Circuit found that this allegation alone was sufficient to confer standing, even though the court acknowledged, "[t]he complaint in the instant case does not specifically allege that the discrimination practiced [by Havens] affect [*sic*] the area where the testers reside" (App. 78). In so holding, the court of appeals expressly declined to formulate any general rule circumscribing standing for tester plaintiffs (App. 71).

In practical effect, the Fourth Circuit's holding concerning the standing of Coleman and Willis gives standing to them both in their status as individual residents of the entire Richmond Metropolitan Area (an area undefined in the Complaint) and in their status as testers, regardless of whether or not they are residents of the Richmond Metropolitan Area.

With regard to the standing of HOME, the court of appeals held that, insofar as its members had been deprived of the same "community advantages" denied to Coleman and Willis by the actions of the defendants, HOME has representational standing to litigate these claims on behalf of its members, relying upon the requirements for representational standing set forth in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) and *Warth v. Seldin*, 422 U.S. 490 (1975) (App. 75-76). The question of representational standing was neither briefed nor argued by HOME in the Fourth Circuit.

The Fourth Circuit also held that the Complaint alleged sufficient injury to HOME as an entity to confer standing on it in its own right, in addition to its standing as the representative of its members. Here, the Fourth Circuit held that HOME had standing because it had been frustrated in its efforts to assist equal access to housing through its counseling and referral services, and because it had devoted significant resources to identifying and counteracting the defendants' discriminatory steering practices (App. 76). The court of appeals held that

HOME's interest was more than the protestation of general interest found to be insufficient for standing in *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *Warth* v. *Seldin*, 422 U.S. 490 (1975), although less than the injury suffered by the non-profit developer in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In so doing, the Fourth Circuit stated that HOME's goals were "functional," and that its "projects" provided " 'the essential dimension of specificity' that informs judicial decision making," as described in *Arlington Heights* (App. 76-77). However, the Fourth Circuit failed to offer any reasons to justify its conclusion that HOME had more than the generalized interest that was insufficient to confer standing in *Sierra Club v. Morton* and *Warth v. Seldin.*

With regard to the statute of limitations, the Fourth Circuit held that the plaintiffs could base their Fair Housing Act claims upon acts occurring outside the applicable 180 day limitation period because the Complaint alleged that the actions of the defendants constituted a continuing violation (App. 81). The court of appeals based this conclusion on the general proposition that the primary focus of the statute is not on isolated instances of discrimination, but rather on the generalized practice of housing discrimination.

SUMMARY OF THE ARGUMENT

I.

HOME does not have standing either as a representative of its members or based on its own injury. Because the Complaint alleges virtually nothing about HOME's members, it is impossible to conclude that the requirements of *Warth v. Seldin*, 422 U.S. 490, 511 (1975), and *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), are satisfied. In particular, it cannot be determined whether any HOME member has standing or whether the participation of individual members in the lawsuit is required. None of the policy reasons which normally justify representational standing, such as promoting judicial economy, are present.

Furthermore, HOME has not alleged a distinct and palpable injury to itself. Although HOME alleges that it is "frustrated" in its efforts to achieve equal opportunity in housing and has spent money to "identify and counteract" the defendants' alleged discrimination, these do not amount to injuries separate from its abstract concern with the problem of housing discrimination, and do not amount to judicially cognizable injuries under Article III.

II.

The Fourth Cirucit held that the individual plaintiffs had standing, solely in their capacity as "testers" for a fair housing organization, to maintain an action under the Fair Housing Act against the defendants, notwithstanding the fact that the individual plaintiffs did not allege any injury to themselves in their capacity as testers. The Fourth Circuit's holding, therefore, has totally eliminated the element of harm or injury to the plaintiff as a standing requirement mandated by Article III. This is contrary to any decision of this Court, or of any other federal court, concerning the minimum requirements of Article III.

III.

The Fourth Circuit held that the individual plaintiffs also had standing in their individual capacities because they alleged that they, as residents of either the City of Richmond or the County of Henrico, Virginia (an area consisting of over 400,000 people) had been deprived of the benefits of interracial association. The Complaint does not establish any causal nexus between the act complained of and the deprivation of the benefits of interracial association. In fact, the Complaint plainly states that the racially segregated housing patterns in Richmond, Virginia, are due to the actions of non-parties to this case, to restrictive covenants, zoning, and other factors. There are no concrete facts alleged from which it could possibly be inferred that, absent the defendants' alleged acts, there is a substantial probability that the individual plaintiffs would not

be denied the benefits of interracial association. Due to the total absence of a causal nexus between act and injury, the individual plaintiffs lack standing.

IV.

Plaintiffs Coleman, Willis and HOME engaged in "testing" Havens' compliance with the Fair Housing Act in March and on July 6, 1978. Being fully apprised of the facts and their rights, if any, under the Fair Housing Act, they nonetheless sat on those rights and did not file this action until more than 180 days after these acts. The 180-day limitation period began to run on the date of these tests, and had run when the present action was filed. The allegation of a continuing pattern of discrimination does not alter this fact, since (1) the mandatory limitation period of Section 3612(a) applies despite such allegations, and (2) the acts of discrimination alleged in this case do not constitute a continuing violation in any event.

I. HOME LACKS STANDING UNDER THE FAIR HOUSING ACT EITHER AS REPRESENTATIVE OF ITS MEMBERS OR BASED ON ITS OWN INJURY.

A. HOME Lacks Standing As A Representative Of Its Members Because The Allegations Of The Complaint Do Not Permit The Conclusion That The Requirements Of *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), Are Satisfied.

Although respondents neither briefed not argued the question of HOME's asserted representational standing,[1] the Court of Appeals for the Fourth Circuit held that HOME did have standing as a representative of its members. According to the

[1] The term "representational standing," also called associational third-party standing, Note, *Associational Third-Party Standing and Federal Jurisdiction Under Hunt*, 64 Iowa L. Rev. 121 (1978), will be used to denote HOME's asserted standing to represent the rights of its injured members, as compared with its asserted standing based on its own alleged injury which is discussed in the next section.

court, "[t]he plaintiff, HOME, claims its members have been deprived of community advantages by defendants' actions in the same language utilized by Coleman and Willis [the individual plaintiffs]. HOME therefore has representational standing to litigate these claims on behalf of its members" (App. 75 footnote omitted).[2] The court of appeals made no attempt to justify this conclusion, but instead merely recited the requirements for representational standing as outlined in *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (hereafter *"Warth"*), and further detailed in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977) (hereafter *"Hunt"*). Having identified the proper test for representational standing, the Fourth Circuit failed to apply that test to the facts of this case.

The requirements for representational standing specified in *Warth* and *Hunt* are clear:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy .... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit .... So long as this can be established, and so long as the nature of the claim and the relief sought does not make individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Warth v. Seldin, 422 U.S. at 511. In *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), this Court specified a more concrete test for representational standing:

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[2] All references to pages numbered "App." are to the Joint Appendix.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.

Id. A cursory examination of the Complaint (App. 11-20) demonstrates that these requirements are not satisfied.

Paragraphs 8 (App. 13) and 16 (App. 17-18) of the Complaint are the only allegations which refer to HOME's members. Paragraph 8 states that HOME's "membership is multi-racial and includes approximately 600 individuals" (App. 13). Paragraph 16 states:

> HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices, in violation of the Fair Housing Act of 1968, 42 U.S.C. § 3601, *et seq.*. [*sic*]

(App. 17-18).

It is impossible to conclude from these conclusory allegations that a single HOME member would have standing to sue in his or her own right. Not one member is alleged to be a resident of *any* area affected by the defendants' allegedly discriminatory practice, whether the relevant area is defined as an apartment complex, *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972) (hereafter "*Trafficante*"), a neighborhood, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (hereafter "*Bellwood*"), or any other area. No clue is provided about who these 600 multi-racial members are, where they reside, work or recreate, or what kind of business, social, political or other ties they might have that could conceivably link them to the challenged acts. In other words,

the Complaint does not allege a causal connection between the alleged injury to HOME's members and the challenged act. Assuming that the deprivation of the benefits of interracial association, without more, is a sufficiently concrete and particularized injury, basic constitutional principles require that the Complaint allege a plausible causal connection between the injury and the defendants' alleged violation. *Warth*, 422 U.S. at 505-506, 509; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-619 (1973).

This requirement of a causal connection between the defendants' conduct and the injury to the plaintiff, of course, is fundamental to the concept of justiciability, since a justiciable controversy does not exist if a court cannot award relief for illegal conduct that is substantially likely to ameliorate the harm allegedly suffered by the plaintiff. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 43 and 44-45 (1976). Without such a causal nexus, no "case or controversy" is presented, since one of the basic requirements of Article III, U.S. CONST. art. III, is that the exercise of judicial power not be gratuitous. *Bellwood*, 441 U.S. at 99; *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 240-241 (1937). The questions presented are not capable of resolution through the judicial process unless the court can ascertain that relief ordered against the defendant will redound to the benefit of the plaintiff. As this Court reaffirmed in *Flast v. Cohen*, 392 U.S. 83, 95 (1968), Article III "limit[s] the business of federal courts to questions presented . . . in form historically viewed as capable of resolution through the judicial process." There can be no "resolution through the judicial process" if the results of that process do not affect the plaintiff.

Furthermore, since the Complaint provides virtually no information concerning HOME's members, it is similarly impossible to conclude that the third element of the *Hunt* test, concerning participation of individual members, is satisfied. Critical to determining whether the participation of individual members is required are two subsidiary questions: (1) whether the association is a suitable representative of its members, *see*

e.g. National Collegiate Athletic Association v. Califano, 622 F.2d 1382 (10th Cir. 1980), and (2) whether the interests of the association's members are too diverse to be represented by the association, *see e.g. Associated General Contractors of North Dakota v. Otter Tail Power Company*, 611 F.2d 684, 691 (8th Cir. 1979); *National Constructors Association v. National Electrical Contractors Association, Inc.*, 498 F. Supp. 510, 521 (D.Md. 1980).

Because of the possible *res judicata* effects of a judgment in an action in which an association maintains standing as a representative of its members, it is particularly important to determine, as part of the third element of the *Hunt* test, whether the association is in fact a suitable representative of its members. Although this Court has not yet addressed the extent to which an association's members are bound by the judgment when an association has represented them in litigation, the United States Court of Appeals for the First Circuit recently held that such a judgment precluded the subsequent assertion of similar claims by a member. *General Foods Corporation v. Massachusetts Department of Public Health*, No. 80-1502 (1st Cir., May 13, 1981). Thus, representational standing holds a potential for serious prejudice to the rights of the association's members. This potential mandates consideration by the court of the appropriateness of the association's representation and the authority by which that representation is undertaken. Unable to inquire into HOME's suitability as a representative of its members because of the virtual absence of information concerning the members, the Fourth Circuit Court of Appeals simply ignored this issue.

The court of appeals in the instant case also ignored any possible diversity of interests among HOME's members. In the case at bar, the controversial and conflicting nature of the relief requested indicates that there may well be many HOME members who favor the equal housing opportunity goals espoused by HOME (App.13), but not the affirmative steering

requested in HOME's prayer for relief (App.19).[3] The court of appeals erred in finding that HOME had standing to represent its members without first determining whether there was such diversity of interests among HOME's members that their individual participation in the suit was required.

Unlike the situation in the *Hunt* case, recognizing HOME's standing in this case would not serve the policies normally served by representational standing. Representational standing in a case such as *Hunt* might be justified because it serves to promote judicial economy with no apparent detriment to that concrete adverseness required to satisfy the case or controversy requirements of Article III. Thus, in *Hunt*, where each of the apple growers and dealers supporting the Washington State Apple Advertising Commission could, and probably would, have enforced their own rights in separate actions, based on their own particularized injury, no rational reason appears for prohibiting the organization from bringing one action as a representative of all its members. In this sense, representational standing is analogous to a class action under Rule 23 of the Federal Rules of Civil Procedure.[4] The members are protected from possible multiple conflicting judgments, the defendant is protected from the burden of multiple actions, and overburdened courts are similarly protected from the threat to judicial integrity resulting from conflicting judgments and from the burden of multiple actions.

When an association does not represent its members' rights, but rather represents its member's rights to represent the rights of others, similar considerations are not present. HOME's members, who HOME asserts have been deprived of

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[3] In this respect, it should be noted that HOME's prayer for relief requests an injunction *against* Havens' steering on account of race in showing apartments (App.19, ¶(b)(ii)) and an injunction *requiring* Havens' use of race to affirmatively steer whites to predominantly black "communities" and vice versa (App.19, ¶(c)(1)).

[4] *See* Note *Organizational Representation Suits: Labor Unions May Attack Employment Discrimination Without Having to Meet Rule 23 Requirements*, 53 Ind. L. J. 113 (1977), discussing *Local 194, Retail, Wholesale and Department Store Union v. Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976).

the benefits of interracial association, have standing only to assert the rights of those who are the direct objects of discrimination. *Bellwood,* 441 U.S. at 103 n.9. Under these circumstances, rather than promoting judicial economy, granting representational standing to associations such as HOME does not assure that one lawsuit will determine all rights against the defendants, since an action by an association, as a representative of members who represent the rights of others, does not bind those whose rights to equal housing opportunity the association gratuitously seeks to enforce. Furthermore, it does not protect those actually injured from multiple conflicting judgments, and it does not protect the defendants from multiple actions.

In considering whether Home has representational standing, it is important to note the implications in terms of the *jus tertii* doctrine. Representational standing is itself a *jus tertii* concept since the organization is asserting the rights of its members. If HOME's representational standing is upheld, HOME will be asserting the rights of its members to assert the rights of others. Although there can no longer be any doubt that a plaintiff who has sustained discrete and palpable injury can assert the rights of others under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, it is stretching Article III limits to the breaking point to suggest that a case or controversy is presented when a party which is not directly injured litigates on behalf of members who are not directly injured in order to enforce the rights of absent persons to equal housing opportunity. This kind of "double *jus tertii,*" in which the plaintiff is twice removed from the alleged act of the defendant, would make a mockery of the Article III requirement that there be a case or controversy *between the litigants.*

Clearly, the Fourth Circuit erred in ignoring the requirements of representational standing and in permitting representational standing to an organization when the beneficial purposes of representational standing are not furthered. The Fourth Circuit's decision should be reversed.

B. HOME Lacks Standing Based On Its Own Injury Because Its Alleged Injury Is Merely The Natural Concomitant Of And Inseparable From Its Abstract Concern With Equal Opportunity In Housing.

When injury to an organization is alleged as the basis for its standing, the question as always is whether or not the organization has suffered "a distinct and palpable injury" to itself which is substantially likely to be redressed by the requested relief. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 261-2 (1977) (hereafter "*Arlington Heights*"). Furthermore, when a plaintiff alleges that the injury results indirectly from an invasion of the rights of others, the burden of demonstrating that the organization meets Article III requirements is very difficult to meet. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976) (hereafter "*Welfare Rights*"); *Warth*, 422 U.S. at 505. Thus, where the injury results, or may result, not from the allegedly illegal act of the defendant but from the independent act of persons not before the court, as in *Welfare Rights*, or where effective realization of the relief requires the independent act of persons not before the court, as in *Warth*, the plaintiff does not have standing. Finally, an interest in or concern with an issue is insufficient to establish standing to litigate that issue. *Welfare Rights*, 426 U.S. at 39-40; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 225-226 (1974) (hereafter "*Reservists*"); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (hereafter "*Sierra Club*").

In the instant case, HOME has asserted an interest in equal opportunity in housing, stating that "[i]ts purpose is to make equal opportunity in housing a reality in the Richmond Metropolitan Area" (App.13) and that "[i]ts goals include the elimination of unlawful racially discriminatory housing practices that cause injury to its members, to all persons who seek to rent apartment units in the Metropolitan Area and to all persons who reside in the Metropolitan Area" (App.13). In its effort to achieve these goals, HOME engages in certain activities, which include "seeking to assist and aid" persons seeking housing and investigating discrimination (App.13-14).

Unquestionably, HOME's standing cannot be grounded in its purpose and goals, which are the basis for its interest in the problem of housing discrimination and in this litigation. This conclusion is mandated by *Welfare Rights*, a case in which five organizations "dedicated to promoting access of the poor to health services," 426 U.S. at 39-40, did not have standing. In that case, this Court stated:

> Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the conrete injury required by Article III .... Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail.

Id. Similarly, in *Sierra Club*, the clear and long-standing interest of the club in environmental matters in general and the Sierra Nevada Mountains in particular did not confer standing. *Sierra Club*, 405 U.S. at 734-736. *Cf. Reservists*, 418 U.S. at 220-221, 225-226.

The question raised by the case at bar, however, is whether HOME has alleged a distinct and palpable injury in addition to or as distinct from its general interest in the elimination of housing discrimination. The Fourth Circuit Court of Appeals erroneously held that it had. An examination of HOME's asserted injury demonstrates that it is indistinguishable from the injury asserted by the Sierra Club and the organizational plaintiffs in *Welfare Rights*. In the Complaint, HOME alleges:

> 16. Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices.

(App.17). These "injuries" asserted by HOME in fact constitute no more than the pursuit of their interest in combating housing discrimination, and for this reason their allegations do

not meet the requirements of Article III. To suggest that HOME not only *has* an interest in fair housing, which is unquestionably insufficient, but also seeks to *further* its interests and is frustrated in its efforts, does not raise HOME above the level of the Sierra Club in *Sierra Club v. Morton*. The expenditure of funds in its efforts to achieve its goals is merely a natural concomitant of those goals. No doubt every special interest group expends money or conducts activities in furtherance of its interests, but HOME cannot acquire self-conferred standing by voluntarily expending funds. The Sierra Club, for example, also alleged that it engaged in "activities and conduct" in furtherance of its interests, *Sierra Club*, 405 U.S. at 735 n.8, a fact which is readily apparent from the organization's maintenance of the suit. Clearly, expenditure of money and effort in pursuit of its goals does not distinguish a special interest group from a plaintiff with cognizable injury.

An examination of an organization's alleged injury in a practical, common-sense way is necessary in order to determine whether or not the injury is a pretext designed to circumvent the constitutional standing limitations requiring a case or controversy between the litigants. HOME is organized because of the existence of housing discrimination and for the purpose of eliminating it. To suggest that the very existence of housing discrimination also results in cognizable injury for standing purposes is to conclude that *any* organization with an interest in *any* problem, organized because of the problem, is similarly injured by the existence of the problem itself. An association could be organized to eliminate employment discrimination, provide job counseling, and sue every employer it thought was discriminating, alleging that its efforts to eliminate employment discrimination were "frustrated" by the existence of that discrimination and that it had to spend money to combat that discrimination. Another association could be organized to eliminate discrimination in granting credit, provide credit counseling, and sue every financial institution it thought was discriminating, making the same allegations as HOME. Indeed, the same bootstrapping used by HOME could be used by individuals. Merely by declaring an ideological interest in a problem, and spending money or effort to further that interest,

the individual would, according to HOME, have met the minimum standing requirements of Article III. Clearly, the Article III requirement of a case or controversy between the parties is not satisfied by ideologically motivated plaintiffs such as HOME whose alleged injuries amount to no more than bootstrapping. The simple fact is that HOME is an organization having nothing more than an abstract concern with housing discrimination. No matter how well-intentioned, abstract concern with a problem does not confer standing.

Two lower courts have considered the question whether an organization has standing when it asserts as an injury the hampering of its objectives or the expenditure of funds to achieve its goals. In *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the Seventh Circuit discussed the standing of an organization similar to HOME called the Leadership Council for Metropolitan Open Communities.[5] The Council alleged precisely the same injury alleged by HOME in this case, namely that it was "devoted to eliminating housing discrimination... [and] that the racial steering attacked here 'hamper[s] and interfere[s]' with the Council's mission and 'cost[s] [it] money' to investigate and attempt to eliminate the practice." *Id.* at 1015 (brackets in original). The court denied standing, pointing out that the alleged "injury" was so inextricably intertwined with the assertion of the Council's interest as to be inseparable for Article III purposes. The court stated:

> [T]he Council's interest in open housing matters and its asserted commitment to effectuating that interest, albeit commendable, do not substitute for the concrete injury constitutionally required to invoke the jurisdiction of the federal courts .... The alleged dollar cost to the Council of attacking defendants' alleged practice is simply "concomitant to [its] keen concern" about open housing issues, and does not present independently cognizable injury.

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[5] This question was not raised on appeal to this Court. *Gladstone, Realtors v. Bellwood*, 441 U.S. at 98, n.5.

Id. at 1017 (second brackets in original). *Accord Mulqueeny v. National Commission on the Observance of International Women's Year, 1975*, 549 F.2d 1115, 1121 (7th Cir. 1977); *City of Chicago Heights v. Arquilla-DeHaan Realtors, Inc.*, No. 77-C-3305 (N.D. Ill., May 21, 1980). Finding no injury for Article III purposes, the circuit court dismissed the Council.

The reasoning of the Seventh Circuit in *Bellwood* applies squarely to HOME in the case at bar. HOME's allegations indicate that it is precisely the kind of ideological plaintiff that does not have standing under the limitations imposed by the Constitution. HOME seeks to use this lawsuit as "a vehicle for the vindication of value interests of concerned bystanders," *United States v. S.C.R.A.P.*, 412 U.S. 669, 687 (1973), thereby requesting what can be no more than an advisory opinion by the federal courts. The "case or controversy" requirement of the constitution requires dismissal of HOME. Therefore, this Court should reverse the Fourth Circuit's decision that HOME has standing to assert its claim.

II. THE INDIVIDUAL PLAINTIFFS LACK STANDING IN THEIR CAPACITY AS TESTERS BECAUSE THEY HAVE ALLEGED NO INJURY TO THEMSELVES IN THAT CAPACITY

Respondents Sylvia Coleman and R. Kent Willis, employees of HOME (App.13), tested the defendants' compliance with the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, in March and on July 6, 1978 (App. 16-17). The Fourth Circuit erroneously held that Coleman and Willis had standing.

The fact that individual plaintiffs in this case are testers has no bearing on the minimum constitutional requirements for standing. All plaintiffs must allege that they have a distinct and palpable injury, caused by the allegedly wrongful act of the defendants, *Warth v. Seldin*, 422 U.S. 490, 499 (1975), which is substantially likely to be redressed by the requested relief. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). However, the Fourth Circuit in this case analyzed these plaintiffs' standing in two ways. First, the court held that they had standing in

their capacity as testers, without regard to any allegations of injury, causal nexus between the injury and the act of which complaint was made, or remediableness. Second, according to the court, they also had standing as persons deprived of the benefits of interracial association. This brief will analyze these two alternative grounds separately because the Fourth Circuit held that Coleman and Willis have standing on either ground alone. In fact, Coleman and Willis have standing on neither ground, and both of the Fourth Circuit's holdings therefore require correction by this Court.

In discussing the standing of the testers in their capacity as testers, the Fourth Circuit apparently reasoned that because of the strong public policy considerations underlying the Fair Housing Act, testers should have standing as "surrogates" for persons who are genuinely injured (App.71), without regard to *any* of the constitutional requirements for standing. While this Court has often recognized that Congress may grant standing to persons who would otherwise be barred by prudential standing limitations, *see e.g. Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979); *Warth,* 422 U.S. at 501, and indeed has done so with respect to the Fair Housing Act, *Bellwood,* 441 U.S. at 109; *Trafficante v. Metropolitan Life Insurance Company,* 409 U.S. 205, 209 (1972), it is also absolutely clear that Congress cannot alter the constitutional requirements for standing. Thus, although standing under the Fair Housing Act is as broad as constitutionally permitted, there are constitutional limitations regardless of the social importance of the substantive nature of the claim.

The Fourth Circuit sought to justify its holding that tester status alone confers Article III standing by citing *Pierson v. Ray,* 386 U.S. 547 (1967) (hereafter *"Pierson"*), and *Evers v. Dwyer,* 358 U.S. 202 (1958) (hereafter *"Evers"*). In *Pierson,* black persons occupied the "whites only" section of a bus station to "test" the validity of a municipal ordinance requiring racial segregation. The black plaintiffs in *Evers* "tested" a similar ordinance by occupying the white section of a bus. This Court held in both cases that simply because the plaintiffs violated the ordinances in order to test their constitutionality

does not deprive the plaintiffs of standing. The so-called "testers" in *Evers* and *Pierson* each suffered specific injury by being unlawfully deprived because of their race of the right to occupy certain public accommodations or conveyances. This Court ruled that Article III is satisfied when such specific injury is present, whether or not plaintiffs incurred the injury solely for the purpose of instituting litigation. The Fourth Circuit, however, inverted the analysis in *Pierson* and *Evers*, and held that, so long as a plaintiff takes action for the purpose of determining whether a law is being violated, standing is conferred, whether or not the plaintiff suffered any distinct and palpable injury at the hands of the defendant.

The approach of the court of appeals to this question is unsupported by prior authority. The standing limitations imposed by Article III of the United States Constitution require that a plaintiff assert a distinct and palpable injury to himself, *Warth*, 422 U.S. at 501 (1975), that is likely to be redressed by the requested relief. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). In this case, plaintiffs did not allege any injury to themselves as testers, and the Fourth Circuit did not find any injury. These plaintiffs did not seek to exercise any rights of their own, as did the plaintiffs in *Pierson* and *Evers*, and do not allege injury to themselves as a result of the denial of the rights of others. Under Article III principles previously announced by this Court, these plaintiffs simply do not have standing in their capacity as testers.

Although the standing of testers has been placed in issue in several lower court cases, the question has always been resolved on the basis of the injury they alleged as persons deprived of the benefits of interracial association. *See e.g. Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Heights Community Congress v. Hilltop Realty, Inc.*, No. C79-422 (N.D.Ohio, December 31, 1980) (App.1-31 in Petitioners' Supplement to Petition for Writ of Certiorari); *Sherman Park Community Association v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D.Wis. 1980); *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321 (N.D.Ill. 1979). In other words, there was an injury that was

alleged to have occurred to those persons in their *individual* capacity. Prior to the decision of the Court of Appeals in the instant case, a court has never suggested that a tester has standing to vindicate the rights of others without regard to any personal injury having been sustained by the tester.

One of the clearest expressions of the kind of allegations which must appear in a complaint in order to demonstrate standing appears in *Warth v. Seldin*, in which the plaintiffs challenged exclusionary zoning practices of the town of Penfield, New Jersey. In *Warth*, the minority group plaintiffs alleged that, as a result of Penfield's exclusionary zoning scheme, they were unable to live in Penfield. The Court stated, however:

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.

Warth, 422 U.S. at 508. *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

Applying the foregoing standards to this case, there is no basis whatsoever for concluding that the testers, solely in their capacity as testers, have standing. The complaint is utterly devoid of a single factual allegation that the testers suffered any injury in their capacity as testers. This being the case, it is conceptually impossible for a tester to show that he would, in his capacity as a tester, benefit from the court's intervention.

From a policy standpoint, there is no need to grant standing to a tester solely in his capacity as a tester. In *Bellwood*, this Court recognized the distinction between an individual who is a resident of the affected area, and who therefore is affected individually by the acts of the defendants, and a tester who is a tester only and not affected individually by the acts of the defendants. *Bellwood*, 441 U.S. at 97-98 and 111. The principal argument for granting standing to the individual residents of the affected area is that it is necessary for the full enforcement of the fair housing laws that Congress

intended, *i.e.*, there is a need for a pool of private attorneys general to insure enforcement of the fair housing laws. *See Trafficante*, 409 U.S. at 211. This pool is established, and in fact continually renewed, by the actual residents of the affected area who are or may be affected by the acts of the defendants. It is these people whose daily lives may be affected by a violation of the fair housing laws, and with their standing to bring an action for a breach of the fair housing laws now firmly established by *Bellwood*, it is clear that few discriminatory housing practices will go unchallenged if a tester, solely in his capacity as a tester, is denied standing.

By conferring standing on testers solely in their capacity as testers, the Fourth Circuit removed any consideration of harm or injury to the plaintiff as an Article III standing requirement. The Fourth Circuit's opinion authorizes a tester who resides in New York, to fly to Chicago over the weekend, conduct tests on a realtor or property owner in Chicago, and then, if the tester believes that the tests demonstrate unlawful activity under the Fair Housing Act, to commence an action in Chicago. This hypothetical testor does not, according to the Fourth Circuit, have to show or even allege that he was injured in any way in his capacity as a tester. This result is clearly at odds with the most fundamental requirements for standing and should be reversed.

III. THE INDIVIDUAL PLAINTIFFS LACK STANDING AS PERSONS DEPRIVED OF THE BENEFITS OF INTERRACIAL ASSOCIATION BECAUSE THEY HAVE NOT ALLEGED A SUFFICIENT CAUSAL NEXUS BETWEEN THEIR INJURY AND THE CHALLENGED ACTS OF THE DEFENDANTS.

The court of appeals also held that the individual plaintiffs, who alleged they had been deprived of the benefits of interracial association, have standing under the Fair Housing Act. In this decision, the Court of Appeals went far beyond this Court's prior decisions concerning standing under the Fair Housing Act in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). The decision of the court of appeals

effectively grants standing to anyone who includes in his complaint the conclusory allegation that he is "deprived of the benefits of interracial association," whether or not there is a logical causal nexus between the defendants' acts and the deprivation. Thus, the decision of the court of appeals effectively eliminates the constitutional requirement that a plaintiff "must allege specific concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (emphasis in original).

The individual plaintiffs in this case alleged only that they are residents of the City of Richmond or the County of Henrico, two contiguous political subdivisions with a population of nearly 400,000 people (App.77). They also claim that defendants' alleged practice in two adjacent apartment complexes in Henrico County "contributes to maintaining existing neighborhood segregation and inhibits the development of stable racially integrated neighborhoods," apparently in the entire Richmond Metropolitan Area (App.14), which presumably includes at least the City of Richmond, the County of Henrico and the County of Chesterfield, an area with a population of well over one-half million people. Nowhere, however, do the individual plaintiffs allege any facts to show how the acts of the defendants cause injury to the entire Richmond Metropolitan Area, nor can that effect be plausibly assumed.

The issue here is the difficult one of determining, from the Complaint, what must be alleged concerning the causal relationship between the acts of the defendants and the alleged injury in order for the court to determine that the allegations are sufficient to evidence standing. The Fourth Circuit simply did not focus upon this issue.

Article III patently requires a causal connection between act and injury. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (hereafter "*Linda R.S.*"), the plaintiff sought to enjoin what she alleged to be the discriminatory application of a Texas statute that concerned child

support. The statute had been construed by Texas courts only to require child support payments by parents of legitimate children and the plaintiff claimed that the refusal of the district attorney to enforce the statute in the case of illegitimate children was discriminatory and harmful to her. This Court noted that the statute in question only provided criminal penalties and characterized as "speculative" the plaintiff's inference that, notwithstanding the limitation of the statute to criminal penalties, enforcement would result in future payments. *Linda R.S.*, 410 U.S. at 618. This Court, therefore, held that there was an insufficient causal nexus between the alleged injury (the deprivation of support payments) and the challenged acts. In so doing, this Court stated that the " 'direct' relationship between the alleged injury and the claim sought to be adjudicated is absent." *Linda R.S.*, 410 U.S. at 615.

Based upon the foregoing, there is no doubt that the plaintiffs in this case must allege a clear causal relationship between the alleged act of the defendants, and the actual injury. *See also O'Shea v. Littleton*, 414 U.S. 488 (1974); *Laird v. Tatum*, 408 U.S. 1 (1972). The inquiry, therefore, is not whether allegations of a causal nexus need be present in a complaint, but rather whether the allegations made are sufficient.

This Court expressly addressed the sufficiency of allegations of causal nexus in *Warth*, a case in which low-income plaintiffs alleged that the exclusionary zoning practices of the town of Penfield caused them to be unable to reside there. The Court noted:

> We may assume, as petitioners allege, that respondents actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' ability to locate suitable housing in Penfield reasonably can be said to have resulted in any concretely demonstrable way from respondents' alleged constitutional and statutory infractions.

Warth, 422 U.S. at 504. In other words, the Court conceded that there was, in fact a relationship between the act (exclusionary zoning) and an effect (increased housing costs), but could not go the further step to find a causal relationship between the act and the injury. The plaintiffs were required to show not just a loss of potential opportunity to acquire housing, but a loss of specific housing and a reasonable basis for the conclusion that concrete future benefits would result from adjudication:

> Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield, and that if the court affords the relief requested the asserted inability of petitioners will be removed.

Warth, 422 U.S. at 504. Thus, although the injury need not be direct, the problem of indirectness in the causal nexus between act and injury made it impossible to conclude that the injury was, in fact, the consequence of the act. Hence, minimal Article III requirements were not satisfied.

The allegations of the individual plaintiffs in this case suffer from the same inadequacies as the allegations that were found insufficient in *Warth*. In *Warth*, the plaintiffs alleged that an illegal act, exclusionary zoning, occurred; in the instant case, the plaintiffs allege that an illegal act, racial steering, occurred. In *Warth*, the plaintiffs alleged that an effect of the illegal act was increased housing costs; in the instant case, the plaintiffs allege that an effect of the illegal act is contributing to the maintenance of neighborhood segregation in the Richmond Metropolitan Area (App. 14). In *Warth*, the plaintiffs alleged that the increased housing costs had the further effect of precluding them from locating suitable housing in Penfield, but this Court recognized that many additional factors could have caused that injury, *Warth* 422 U.S. at 505-09; similarly, in the instant case, many other factors, according to the plaintiffs' own allegations, deprive them of the benefits of interracial association. The only allegation that draws any nexus between the

alleged acts of the defendants and the ultimate injury those acts are supposed to have created appears in paragraph 10 of the Complaint:

> 10. Like other metropolitan areas throughout the United States, the Richmond Metropolitan Area, including Henrico County, has been marked by racially segregated residential housing patterns. Neighborhoods have reflected the impact of segregation resulting from the actions of private individuals and groups, restrictive covenants, zoning and other factors, so that area neighborhoods can generally be identified as "white" or "black" neighborhoods. The practice or [*sic*] "racial steering" engaged in by these defendants, contributes to maintaining existing neighborhood segregation and inhibits the development of stable racially integrated neighborhoods.

(App.14) The individual plaintiffs merely allege that they are residents of either the City of Richmond or Henrico County, Virginia (App. 13), an area consisting of over 400,000 people (App. 77). By their own allegations, plaintiffs have demonstrated that they suffer from the same disability as the petitioners in *Warth*.

Thus, in this case as in *Warth*, the plaintiffs must allege facts from which it reasonably could be inferred that, absent the defendants' alleged acts, there is a substantial probability that they would not have been denied the benefits of interracial association. The Fourth Circuit held, in effect, that merely by alleging that they were residents of the City of Richmond and Henrico County, and that the acts of the defendants "contribute" to maintaining existing neighborhood segregation in the Richmond Metropolitan Area, the individual plaintiffs had sufficiently alleged a nexus between the injury and the acts of the defendants. That conclusion, very simply, is a quantum leap of faith that is unsupportable and incorrect. The individual plaintiffs failed to plead a single fact that would justify any reasonable inference that the alleged discrimination at two adjacent apartment complexes in Henrico County has denied, or "contributed" to the denial, of the benefits of interracial association, to every one of the 400,000 residents of the City of Richmond and County of Henrico.

The Fourth Circuit's opinion is inconsistent with the analysis of causal nexus mandated by *Warth* and is not in any manner supported by *Bellwood* or *Trafficante*. In *Bellwood*, four residents of an integrated neighborhood allegedly "targeted" by the defendant for racial steering were found to have standing because the defendants' conduct allegedly jeopardized their right to live in an integrated community. However, summary judgment was affirmed against two non-residents of the affected area who alleged no facts to show how steering directed towards the target neighborhood affected the areas where they resided. *Bellwood*, 441 U.S. at 111 n.25. Furthermore, in *Bellwood*, it was reasonable to conclude that the defendants' conduct affected an entire neighborhood because the defendants were residential real estate brokers who sold houses in that neighborhood. By contrast, the defendants in the case at bar manage two adjacent apartment complexes and cannot reasonably be said to affect the entire Richmond Metropolitan Area. Similarly in *Trafficante*, the plaintiffs were residents of the apartment complex that was the target of defendants' alleged discrimination. They had standing to challenge their landlord's discriminatory rental policies because those policies denied the plaintiffs the right to live in an integrated comunity. *Trafficante*, 409 U.S. at 206. The *Trafficante* plaintiffs resided in the apartment complex where the acts of discrimination occurred. Therefore, it was reasonable to conclude from those facts that the plaintiffs suffered actual injury that would be redressed by cessation of the alleged discrimination. *Bellwood* and *Trafficante* clearly did not hold, as the Fourth Circuit has here, that racial discrimination practiced by a landlord of an apartment complex could be challenged by all persons residing in an entire metropolitan area absent the allegation of facts which justify that conclusion.

Obviously, a formula for the sufficiency of causal nexus allegations that would apply to all Fair Housing Act cases cannot be articulated. The sufficiency must, in each case, ultimately depend upon the nature of the defendant's act, where the act occurs, the demographic factors of the area where the act occurs, and a variety of other factors. The Fourth Circuit's holding, however, that a simple conclusory allegation

that every resident in the City of Richmond and County of Henrico is deprived of the benefits of interracial association by virtue of the acts of the defendants at two adjacent apartment complexes clearly exceeds any reasonable test for determining standing based upon the allegations appearing in a complaint. If such conclusory allegations are capable of ultimate proof at trial, then there must exist a reasonable set of facts to support them. Those facts, relating the causal nexus between the injury and the allegedly unlawful act, must be set forth in the complaint. Requiring the allegation of specific, concrete facts is essential to permit the court to ascertain with reasonable certainty at the outset that the power of the court is not being invoked unnecessarily and gratuitously.

Thus, in holding that the individual plaintiffs have standing based on the alleged deprivation of the benefits of interracial association, the Fourth Circuit erred by failing to recognize the insufficiency of the causal nexus between the plaintiffs' alleged injury and the alleged wrongful act. Its decision should be reversed.

IV. PLAINTIFFS' CLAIMS UNDER THE FAIR HOUSING ACT ARE BARRED BY THE LIMITATION PERIOD IN SECTION 3612(a) BECAUSE THEY DID NOT COMMENCE THIS ACTION WITHIN 180 DAYS AFTER BEING FULLY APPRISED OF THE FACTS AND OF THEIR RIGHTS, IF ANY, UNDER THE ACT.

The district court below found that all claims under the Fair Housing Act, except those based on the alleged discriminatory act of July 13, 1978, were time barred (App.33). The Court of Appeals for the Fourth Circuit reversed, citing various cases in which courts have recognized continuing violations under the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereafter Title VII), as well as *Baker v. F & F Investment,* 420 F.2d 1191 (7th Cir. 1970), a case brought under Section 1982 of the Civil Rights Act of 1866, 42 U.S.C. § 1982 (App. 79-80). According to the court of appeals, there was a "continued relationship" between plaintiffs and defendants and a "continued violation" of the Fair Housing Act until

July 13, 1978; therefore the limitation period had not run when this action was filed (App. 81).

The difficult question thus presented is when the limitation period of the Fair Housing Act starts to run on the claims of persons who, like the plaintiffs, are not the direct objects of discrimination, yet allegedly suffer its results. Plaintiffs allege that in March and July of 1978, Coleman and Willis "tested" Havens' compliance with the Fair Housing Act, and concluded that Havens was engaged in racial steering in violation of the Act. Yet they sat on their rights, and did not file the present action until more than 180 days after these tests.[6]

Section 3612(a) of the Fair Housing Act provides simply: "a civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." 42 U.S.C. § 3612(a). A discriminatory housing practice is defined as "*an act* that is unlawful under section 804, 805 or 806" [42 U.S.C. §§ 3604, 3605, 3606]. 42 U.S.C. § 3602 (emphasis added). The plain language of the section mandates that in March, 1978, when Coleman and Willis inquired about vacancies at Colonial Court and Camelot Townhouses and determined that a violation of the Fair Housing Act had then occurred, the limitation period started to run.[7]

In March, 1978, Coleman, Willis and HOME were fully apprised of the facts and of their rights, if any, to bring their action under the Fair Housing Act, yet they did not do so. Their action is thus plainly time barred unless the fact that they alleged a continuing violation, specifically a "pattern or practice" of discrimination, saves the action, or unless their status as

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[6] The events of July 13, 1978, a date within the limitation period on which the action of Paul Allen Coles was based, did not involve Coleman or Willis.

[7] Three "tests" were conducted in March, 1978. Although defendants believe the limitation period began to run with the first "test," the period ran with respect to each of the tests in March and the one on July 6, 1978, before the present action was filed. Thus, it is unnecessary to consider when Coleman and Willis actually became convinced that a violation had occurred, except to conclude that surely by the fourth "test" on July 6, 1978, they had no further doubt.

persons allegedly deprived of the benefits of interracial association precludes the running of the limitation period.

The latter contention would indefinitely extend the period in which plaintiffs may sue, based on their allegation that they continue to suffer injury from the allegedly discriminatory acts of Havens. The argument that an action may be based on continuing effects of past discrimination was an important continuing violation theory in Title VII cases prior to this Court's decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 533 (1977).[8] In *Evans*, this Court held that an airline flight attendant whose employment was wrongfully terminated in 1968 could not, after she was rehired, base a Title VII action on the fact that she continued to suffer the adverse effects of that termination. This Court stressed that the act of discrimination against Evans occurred in 1968; the application to her of a facially neutral seniority system was not a present violation of Title VII. The same rationale is appropriate with respect to Coleman and Willis. Although they allegedly continue to suffer the effects of Havens' alleged discrimination, they point to no act of discrimination against them within the limitation period, and their claims are therefore barred.

A contrary conclusion would mean that there is no effective limitation on the bringing of an action by one who alleges deprivation of the benefits of interracial association, since that effect could conceivably continue for years after cessation of any violation. This result is plainly not contemplated by the mandatory language of the statute: "a civil action *shall* be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." 42 U.S.C. § 3612(a) (emphasis added).

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[8] *See e.g. Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976); *Williams v. Norfolk and Western Railway Co.*, 530 F.2d 539 (4th Cir. 1975); *Marquez v. Omaha District Sales Office*, 440 F.2d 1157 (8th Cir. 1971); *Kennan v. Pan American World Airways, Inc.*, 424 F. Supp. 721 (N.D.Cal. 1976); *Burwell v. Eastern Air Lines, Inc.*, 394 F. Supp. 1361 (E.D.Va. 1975); *Tippett v. Liggett & Meyers Tobacco Co.*, 316 F. Supp. 292 (M.D.N.C. 1970); *Austin v. Reynolds Metals Co.*, 327 F. Supp. 1145 (E.D.Va. 1970).

If Coleman and Willis are permitted to bring their action as long as the effects of the alleged discrimination continue, one who is not the object of discrimination would have a distinct advantage over one who is the object of discrimination whose action must still be filed within 180 days of the discrimination against him. Although persons who have genuinely been deprived of the benefits of interracial association may sue to enforce the rights of others, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), they should not be permitted greater rights than those whose rights they enforce.

In *Delaware State College v. Ricks*, ____U.S.____, 101 S. Ct. 498, 505, 66 L.Ed.2d 431 (1980), this Court noted that "time-limitations provisions themselves promote important interests; the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones," quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-4 (1975). Balancing the interests of the plaintiffs in the case at bar with the interests of defendants demonstrates that the position for which the plaintiffs argue would wholly eliminate any protection for defendants under the Fair Housing Act from stale claims, since plaintiffs would have an indefinite period in which to institute their action. Where contact between plaintiffs and defendants is fleeting—consisting of telephone calls or meetings of a few moments duration—protection for the defendants is particularly important. Congress has made the value judgment that private claims based on acts occuring more than 180 days prior to the institution of the action are stale, and that value judgment is binding on this Court.

Plaintiffs have not advanced any reason for their failure to file their action in March, 1978, nor have they denied that they could have done so. Although there may be situations in which a lay person is unaware of the fact that discrimination has been practiced against him, plaintiffs clearly do not fall into such a category. In view of the fact that they deliberately set out to test Havens' compliance with the Fair Housing Act, there can be no question that they were fully aware of their rights. No

reasons of policy appear to suggest that they should be permitted to sit deliberately on their rights.

In both the court of appeals and district court, plaintiffs argued that, because they had alleged that they continue to suffer injury as a result of defendants' alleged discrimination, and because they alleged a "continuing pattern of discrimination" (App. 41), the limitation period of Section 3612 is "tolled" [9] (App. 42). Plaintiffs' reliance on their allegations of a continuing violation to preclude the running of the limitation period in this case is inappropriate and unnecessarily confuses the issue. As previously demonstrated, the limitation period, under the circumstances of this case, started to run against Coleman, Willis and HOME at least by July 6, 1978, and had run before the date the action was filed.

To respond to plaintiffs' attempt to bring themselves within the so-called continuing violation theory utilized in Title VII cases, however, it is necessary to recognize, first that "pattern or practice" actions are committed by the Fair Housing Act to the Attorney General of the United States, and, second, that even if a continuing violation theory were appropriate under Title VIII, such a violation is not present in this case.

The Fair Housing Act provides for enforcement either by private plaintiffs under Section 3612, 42 U.S.C. § 3612, or by the Attorney General of the United States under Section 3613, 42 U.S.C. § 3613, when the Attorney General "has reasonable cause to believe that any person is engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights granted by this subchapter." 42 U.S.C. §3613(a) (emphasis added). Of course, private plaintiffs have no standing to sue under Section 3613.

Unlike Section 3612, Section 3613 contains no express limitation period. The language of Section 3613 suggests that a pattern or practice suit by the Attorney General is timely if filed

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[9] Although plaintiffs use this language, they do not appear to argue that the federal doctrine of equitable tolling is applicable to this case. Rather, they rely by analogy on the continuing violation theory utilized in Title VII cases, 42 U.S.C. § 2000e *et seq.*, to save actions which would otherwise be barred by the limitation period in 42 U.S.C. § 2000e-5(e).

concurrently with the alleged pattern or practice of discrimination.[10] Section 3612, under which plaintiffs' action is (and must be) brought does contain an express and mandatory limitation. Although by its standing decisions this Court has recognized a class of "private attorneys general" entitled to sue under the Fair Housing Act, *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972), these are still private plaintiffs who must comply with the private enforcement provisions of the Fair Housing Act. Plaintiffs' allegations of a "pattern" of discrimination do not alter the question which must be answered in every case under Section 3612: was the action "commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred"? 42 U.S.C. §3612(a). Plaintiffs' "pattern or practice" allegations add nothing to the proper resolution of that question.

Furthermore, even if a continuing violation rationale is appropriate under Title VIII,[11] the alleged acts of discrimination do not constitute a continuing violation which

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[10] Under the analogous provision of Title VII, this Court has held that no statute of limitations applies to the Equal Employment Opportunity Commission's "pattern or practice" actions under 42 U.S.C. § 2000e-5(f)(1). *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission,* 432 U.S. 355 (1977).

[11] Since this Court's decision in *United Air Lines, Inc. v. Evans,* 431 U.S. 533 (1977), the validity of the continuing violation theory under Title VII has been questioned, provoking considerable commentary in the secondary literature. *See e.g. The Continuing Violation Theory of Title VII After United Air Lines, Inc. v. Evans,* 31 Hastings L. J. 929 (1980); Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits,* 67 Geo. L. J. 811 (1979); *Title VII and the Continuing Violation Theory: A Return to Congressional Intent,* 47 Fordham L. Rev. 894 (1979); *Continuing Violations of Title VII: A Suggested Approach,* 63 Minn. L. Rev. 119 (1978); *Continuing Violations in Private Suits Under Title VII of the Civil Rights Act of 1964,* 32 Ark. L. Rev. 381 (1978). The more recent decision in *Delaware State College v. Ricks,* ____U.S.____, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), further emasculated the continuing violation theory in holding that the mere continuance of an employment relationship does not prevent the limitation period from running. In *Evans* and *Ricks,* this Court determined that the limitation period started to run on the date the alleged violation occurred. Thus, the application of the continuing violation theory has been at least narrowed, and has perhaps been precluded from saving otherwise time-barred actions by these decisions.

would preclude the running of the limitation period. There may be violations of the Fair Housing Act which cannot be said to occur at any identifiable point in time and which are conceptually thought of as occurring in a continuing fashion. But in the case at bar, the alleged steering by Havens consists of specific and discrete acts, occurring at identifiable points in time. They are in no sense "continuing." As the district court in *Stingley v. City of Lincoln Park*, 429 F. Supp. 1379 (E.D.Mich. 1977) aptly stated:

> Here, in the case at bar, the contact between the plaintiff and the defendant was such that an exact date can be determined on which the alleged discriminatory practice occurred. If there was validity to the argument that because the defendant still maintained its residency policy that there was a continuing discriminatory act, then the time limits of Title VII [*sic*] would become entirely meaningless. For example, in every case of employment discharge brought under Title VII, plaintiffs invariably plead a pattern and practice of discriminatory conduct. Since this pattern and practice arguably continues, the end result would be that a discharged employee would have forever to bring his complaint. Such was clearly not the intention of Congress in enacting the time limits that are contained in both Title VII and Title VIII. Similarly, as applied to the facts in this case, the argument advanced by the plaintiff would mean that there would be no time limit in which they would have had to institute action.

Id. at 1391. The Complaint filed by the plaintiffs in the case at bar alleges specific and discrete acts of discrimination which occurred more than 180 days before their complaint was filed. They failed to act on any claims which arose from these acts. The statute of limitations plainly bars such claims.

The fact that plaintiffs allege four discrete violations, rather than one, does not change the nature of the violation into one that did not occur at an identifiable point in time. As the Third Circuit Court of Appeals correctly reasoned in holding that the

limitation period under Section 3612(a) had run on a tester who prompted several identical violations:

> Such a tactic, if permitted, would enable a victim of alleged discrimination to circumvent the statute of limitations merely by provoking his adversary into another refusal to sell or rent. We cannot believe that Congress intended the 180 day limitation of section 3612(a) to operate in such a fashion.

Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894, 899 (3d Cir. 1977). The plaintiffs in the case at bar have similarly alleged acts of discrimination against them beyond the 180 day period. To permit them to maintain the action would be to abrogate the limitation period established by Congress.

The court of appeals apparently believed that a "continued relationship" between plaintiffs and defendants existed because of the repetitious contact between them and that this relationship was sufficient to show a continuing "practice of prohibited discrimination against these specific individuals" (App. 81). It is difficult to understand how the plaintiffs and defendants in this case could be said to have had a continuing relationship. Havens had no contact or communication with HOME at all, except through its testers. The testers themselves never sought any relationship with Havens, and the communications between the testers and Havens consisted of telephone calls or meetings lasting a few moments.

Furthermore, in *Delaware State College v. Ricks*, ____ U.S. ____, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), this Court emphasized that continuity of relationship is not sufficient to establish a present violation of Title VII. In that case, a professor alleged that he had been discriminatorily denied tenure. As was the customary procedure, Ricks was granted a one-year terminal contract, which he accepted. He argued that the limitation period did not begin to run until his employment relationship with Delaware State College ended. In rejecting this argument, the Court noted that the discriminatory denial of tenure occurred at least by June 26, 1974, although that denial

was reaffirmed on later dates. Neither the subsequent reaffirmations of the denial, nor the fact that an employment relationship between Ricks and the college continued, prevented the limitation period from running.

The approach taken by this Court in *Evans* and *Ricks* in Title VII cases in which continuing violations were alleged is the approach which should be taken in the case at bar. The limitation period starts to run on the date the alleged violations occurred. The plaintiff must file his action within 180 days of that date. Coleman, Willis and HOME did not do so, and their action is barred. Accordingly, the decision of the Fourth Circuit to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fourth Circuit should be reversed and judgment entered for the petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief For Petitioners have been served by mail on Vanessa Ruiz-de-Elejalde, Fried, Frank, Harris, Shriver & Kampelman, 600 New Hampshire Avenue, N.W., Suite 1000, Washington, D.C. 20037, counsel of record for the respondents.
